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sleeping over time } village)

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IN THE

Supreme Court of the United States

October Term, 1953

No. 599

GENERAL ELECTRIC COMPANY,
a Corporation,
Petitioner,

vs.

AVERILLE L. PORTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No.....

GENERAL ELECTRIC COMPANY,
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Petitioner,

vs.

AVERILLE L. PORTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:

The General Electric Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 7, 1953.

Opinion Below

The opinion of the District Court is not reported, but appears at page 87 of the record. The opinion of the Court of Appeals for the Ninth Circuit is not yet reported but appears at page 454 of the record.

Jurisdiction

The judgment of the Court of Appeals was entered on December 7, 1953. (R. 479) A petition for re-hearing was timely filed but was denied on January 11, 1954. (R. 480). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

The Questions Presented

1. Were the community firemen of Richland and North Richland, Washington, engaged in an occupation both "closely related" and "directly essential" to the production of goods for commerce within the meaning of the definition of "produced" contained in Section 3 (j) of the Fair Labor Standards Act of 1938, as amended?

2. Was the finding of the District Court that eight hours sleeping time of the community firemen was not compensable working time a mixed question of fact and law for which the Court of Appeals could substitute its own judgment, despite the fact that there was substantial evidence to support the District Court's finding?

Statutes, Regulations and Legislative History Involved

The relevant portions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 207 and 29 U.S.C. 203 (j), are set forth in Appendix A. Likewise, the Administrator of the Wage and Hour Division's Bulletin, 15 F.R. 2925, Section 776.17, on the 1949 amendment of Section 203 (j) is set forth in Appendix B, and the House Manager's Statement on such amended Section 203 (j) is set forth in Appendix C hereto.

Statement

In this case the community firemen of Richland and North Richland, Washington, sought overtime compensation under the Fair Labor Standards Act of 1938, as amended. These community firemen alleged that they were covered by the Act since they were engaged in an occupation closely related and directly essential to the production of goods for commerce within the Act and both the District Court and the Court of Appeals so held. (R. 5, 96, 463). The District Court found that eight hours sleeping time, less time actually spent on alerts, alarms and investigations, of each twenty-four hour shift spent at a fire station was not compensable work time, but the Court of Appeals reversed this finding, holding that it was a mixed question of fact and law and that they were free to substitute their judgment for the finding of the trial court. (R. 94, 470-475).

General Electric Company, hereinafter referred to as General Electric, operated Hanford Works for the Atomic Energy Commission, an agency of the United States, hereinafter referred to as the Commission, under a contract for cost plus a fixed fee of $1.00 for the ten year term. (R. 92, 168, 117, Pls. Ex. 5).

This plant was engaged in the production of plutonium for military use. (R. 92, 316, 317). It occupied about 600 square miles of a Federally-owned area comprising parts of Benton, Franklin, Grant, Adams and Yakima Counties, in the State of Washington. (R. 21, 93, 317). The whole of this vast plant area was within a perimeter barricade and the widely scattered production units were each further enclosed in a series of inner barricades. These production units were located many miles from the residential communities of Richland and North Richland, the nearest being seven miles from Richland and the farthest 37 miles. (R. 320, 321, 322).

Contrary to the allegations of the firemen, the District Court found the barricaded plant area was protected by a plant fire department which was separate and distinct from the community fire department. (R. 5, 93). The uncontradicted evidence revealed that the plant fire department was responsible to the plant utilities and general service department, while the community fire department was under the supervision of the Community Manager; that the union affiliation of the members of these two fire departments were different; that there was no right

of transfer between them; that plant firemen worked a 40-hour week for a fixed hourly wage plus shift differentials, as opposed to the two-platoon system of 24 hours on, 24 hours off, and each sixth shift off, for a fixed monthly wage for community firemen; and that plant firemen received the training of industrial firemen plus special training due to the danger of radiation in a plutonium plant, while community firemen received the usual training of municipal firemen with no special training based on radiation hazards. (R. 156, 157, 223, 309, 310, 311, 312, 313, 324, 335, 342, 343, 349, 357). Nevertheless, the Court of Appeals seems to have found otherwise. (R. 463).

The communities of Richland and North Richland were and are located in the southern tip of such Federally-owned area, at the confluence of the Yakima and Columbia Rivers, but without the barricaded plant area. As is the case with ordinary municipal fire departments, they protected all persons and property within these communities against the hazards of fire. (R. 214).

The Trial Court had viewed the premises and characterized the community as follows:

> "The Court has on a prior occasion viewed the whole place down there . . . it's by and large a typically American city of 25,000. . . . I mentioned the better planning, but aside from that, isn't it true you find there the things you'd find in any city of 25,000, stores, churches, grocery stores, hardware, banks and everything else that you find in a city of 25,000?"
> "A. (By Respondent's attorney) That's certainly true." (R. 225, 226).

Richland had a population of some 23,000 persons and had the usual facilities of such a city—5765 dwellings, schools, churches, banks, parks, Greyhound bus terminal, business houses, etc. (R. 212, 214, 215, 217, 218, 219, 220, 221). It was a closely built, planned community with an area of about 4½ square miles. (R. 212). There were no plant production facilities within the city and the only installations which had any connection therewith are these: (1) The 700 Area of about four square blocks which housed certain executive and administrative offices of General Electric, the Commission, and other Federal agencies; (2) a bus terminal for transportation of workers to and from the distant production units; and (3) a community hospital serving the needs of 30,000 inhabitants of these communities, which did some plant physical examinations. (R. 93, 174, 175, 176, 178, 179, 214, 215, 295, 300).

North Richland was a smaller, like residential community of about six to eight thousand population, with similar living and business facilities, covering an area of about 2½ square miles. (R. 297, 126, 127). There is evidence that the plant railroad had a railroad track adjacent to North Richland and that General Electric occupied some space in one building there, but no evidence as to how much, for what purpose, or how many persons were located there. (R. 129, 145, 146).

General Electric was appointed "as agent of the Government" to administer and lease land, stores and other

buildings in these communities and did agree "to do all things necessary to manage or operate and maintain the facilities . . . in and about the communities of Richland and North Richland . . ." (R. 117, 118, Pls. Ex. 5, Article II, Sec. 9). The communities were actually operated by a Community Manager, an employee of General Electric, with the advice of an elected council. The community fire department was under his supervision. (R. 210, 211, 429).

The community firemen were employed on the two-platoon system under which a fireman spent 24 hours at the fire station, had 24 hours off, and had each sixth shift off. (R. 94). Under this system, the most commonly used in municipal fire departments in the State of Washington, a fireman was at the fire station 48, 72 or 96 hours per week. (R. 337, 350). A typical day for firemen was like that in municipal fire departments — a platoon's shift started at 8 A. M., the fire apparatus and housekeeping chores were first accomplished; during good weather there was 30 minutes drill in the morning; from 11 A. M. until 1 P. M. was lunch period with no duties absent alarms; after lunch there might be an hour's instruction, but the men were generally free of all duties except for alarms at 4:30 P. M. Total time spent during an ordinary day on active work did not exceed 4 hours. The men were permitted to retire for the night at 9 P. M. and had to arise at 7 A. M. next morning. (R. 347, 348, 368, 371). The trial court found the sleeping facilities adequate and that there was reasonable opportunity for 8 hours sleep. (R. 94). The Court of Appeals held only that it was *probable*

that these community firemen had more alarms than industrial firemen in reported cases. (R. 474). There was no need to indulge in such probabilities. The firemen introduced the records made from the logs kept by them and they reveal plaintiff Porter had four alerts in 38 weeks, totalling 1¼ hours, but never left the station during sleeping hours during the time in question, and alerts, alarms and investigations for other firemen varied from one alarm in 48 weeks totalling three-fourths of an hour for fireman York, to a high of 18 in 50 weeks, totalling 15 hours, for fireman Nelson. The 55 firemen tabulated on Exhibit 1 show an alert, alarm or investigation once in every 5.21 weeks on the average, with an average duration of 19.44 minutes. (R. 117, Pls. Ex. 1). The District Court allowed 8 hours as sleeping time, although the men were allotted 10. The frequency of sleep interruptions here was well within the range of those in decided firemen cases holding such sleeping time was not work time. Compare:

Bell v. Porter, (D.C., Ill., 1946), 66 F. Supp. 49;
Rokey v. Day & Zimmerman, (8th Cir., 1946), 157 F.(2d) 734;
Bowers v. Remington Rand, (7th Cir., 1946), 159 F.(2d) 114;
Buckner v. Armour & Co., (D.C., Tex., 1942), 53 F. Supp. 1022;
Armour v. Wantock, (7th Cir., 1944), 140 F.(2d) 356, (Affirmed 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118).

The Court of Appeals did not hold that there was no substantial evidence to support the finding of the District

Court, or that such finding was inadequate, but only that it could substitute its judgment therefor. (R. 470).

REASONS FOR ALLOWANCE OF WRIT

The two questions presented in this petition are separate and distinct, as are the reasons therefor. The first deals with coverage under the Act and the second with whether the Court of Appeals may substitute its judgment for the finding of the District Court as to what constitutes working time.

I. Coverage

The question of whether or not the community firemen of Richland and North Richland, Washington, were engaged in an occupation both closely related and directly essential to the production of goods for commerce determines, in this case, the question of whether or not they were covered by the Fair Labor Standards Act of 1938, as amended.

At time of argument this was a case of first impression in a Court of Appeals, although *Union National Bank of Little Rock v. Durkin,* (8 Cir., 1953), 207 F.(2d) 848, was decided on November 6, 1953, and has never been passed upon by this Court, since the 1949 amendment of 29 U.S.C. 203(j). Prior to the 1949 amendment this Section had been construed by this Court by certiorari in a number of historic decisions:

Kirschbaum v. Walling, 316 U.S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638;
Borden v. Borella, 325 U.S. 679, 65 S. Ct. 1223, 89 L. Ed. 1865;
10 East 40th Street Building, Inc. v. Callus, 325 U.S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806;
Roland Electric Co. v. Walling, 326 U.S. 657, 66 S. Ct. 413, 90 L. Ed. 383;
Farmers Reservoir and Irrigation Co. v. McComb, 337 U.S. 755, 69 S. Ct. 1274, 93 L. Ed. 1672.

Prior to the 1949 amendment, 29 U.S.C. 203(j) provided coverage under the Act, in conjunction with 29 U.S.C. 207, for employees engaged in an occupation "necessary" to the production of goods for commerce. By the 1949 amendment to such section Congress narrowed the coverage thereunder by providing that an employee was covered by the Act only if his occupation was both "closely related" and "directly essential" to the production of goods for commerce. That it was the express intention of the Congress to narrow the coverage of the Act and remove from coverage essentially local activities, because the courts had extended the coverage beyond that intended, is abundantly clear from the Administrator's Bulletin, Appendix B, and the House Manager's Statement, Appendix C. The Administrator summarizes the Congressional intent as follows:

> "The legislative history shows that new language in the final clause of Section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope of its coverage . . ." (Sec. 776.17(a))

This section of the Fair Labor Standards Act of 1938, as amended, effects the only coverage under the Act for

countless thousands of workers in every nook and cranny of this country, for both minimum wages and overtime compensation, and thereby has a vital and widespread effect upon the rights and liabilities of employers and employees alike, upon the economy of this country, and upon the business of the courts, for it is a much litigated problem. The construction of this section is a problem of major public importance.

The case at bar is an excellent case in which to work out the dividing line, at the outset, between coverage and non-coverage under the 1949 Amendment to the Act. The Administrator of the Wage and Hour Division in his Bulletin, Appendix B, has sought to give some meaning to the Amendment. Yet, the lower courts, as in the case at bar, repeatedly ignore such regulations until some higher court has given weight thereto. The Administrator recognized that court decisions would be essential to draw the new dividing line between coverage and non-coverage, for in his Bulletin he said:

> ". . . there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions by the courts."

The Court of Appeals for the Ninth Circuit in the case at bar recognized that this was just such a borderline case, for it held as follows:

> "This is a case poised on the borderline of coverage and non-coverage." (R. 476).

and, in *10 East 40th Street Building, Inc. v. Callus,* 325 U.S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806, this Court said:

> "On the terms in which Congress drew the legislation we cannot escape the duty of drawing lines."

There is a need for a definitive and authoritative decision on the new language, for a construction of the intent of Congress, and for a start, at least, on the new problem of the dividing line under this section. With the decided cases under this section prior to the amendment, the effort of Congress to make its intent clear, and the Administrator's Bulletin, the situation is sufficiently clear now that such an opinion might be written. It would avoid a good deal of litigation hereafter on a much litigated question and give some force to the Administrative regulation thereon. It is in such a borderline case that the line can be drawn.

In both lower Courts, General Electric presented two primary arguments against coverage. They were, first, that in providing fire protection for the communities of Richland and North Richland both General Electric and the community firemen were engaged in an essentially local activity not covered by the Act, and, second, that the protection of such administrative facilities and persons within the communities as were related to the production of gods for commerce was no substantial part of the whole of the firemen's duties.

The first contention was not mentioned in either opinion. In the first of the three great building cases,

Kirschbaum v. Walling, 316 U.S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638, this Court held that maintenance employees of loft buildings, which were almost entirely occupied by manufacturers of clothing, or buyers and sellers thereof, were "necessary" to the production of goods for commerce. In the second building case, *Borden Co. v. Borella*, 325 U.S. 679, 65 S. Ct. 1223, 89 L. Ed. 1865, relied upon by the Court of Appeals in its opinion, this Court held maintenance employees of a 24-story building owned and operated by an interstate manufacturer, whose central offices occupied 58% of the total rentable area, were engaged in an occupation "necessary" to the production of such goods. However, in the third building case, *10 East 40th Street Building, Inc., v. Callus*, 325 U.S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806, this Court held maintenance employees of an independently operated office building, 42% of the rentable area of which was occupied by executive and administrative officers of those engaged in the production of such goods, were not "necessary" to such production. This court held that "predominantly local situations" were not within the confines of the Act, and held as follows:

> ". . . we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the States.' We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

But the lower courts did not extend the principle of the *Callus* case, decided in 1945, much beyond its factual

situation and it was necessary for Congress, by the 1949 amendment of 29 U.S.C. 203(j), to narrow the coverage of the Act. In the House Manager's Statement, Appendix C, the Congress clearly states that the Courts have gone too far in including essentially local activities within the coverage of the Act and that this amendment was designed to halt this practice. In that statement Congress indicated that it did no inend to cover "employees engaged in mainaining and repairing private homes and dwellings where such homes and dwellings were being leased by interstate producers to their employees," and that "employees engaged in providing residential, eating or other living facilities for factory workers, are quite clearly not performing any activities closely related and directly essential to the production of goods."

Following this amendment, the Administrator issued a new Bulletin, Appendix B, and in Section 776.18(b) thereof gives this example of the line between coverage and non-coverage:

> "Such services as watching, guarding, maintaining or repairing the buildings, facilities and equipment used in the production of goods, for commerce are 'directly essential' to such production. . . . But such services performed with respect to private dwellings tenanted by employees of the producer, as in a mill village, would not be 'directly essential' to the production of goods for commerce merely because the dwellings were owned by the producer and leased to his employees."

In the case at bar, General Electric owned no real property in Richland and North Richland. (R. 317). It acted as agent of the government in leasing the same, and by contract operated and maintained the necessary facilities for such communities. (R. 117, Pl. Ex. 5). Both the District Court and Court of Appeals characterized these as typical towns of their size. (R. 225, 457). The fire department thereof is also typical—the two-platoon system is the most commonly used municipal system in this state, its training is that of a municipal department, and its duties are exactly the same. (R. 337, 343). There is nothing more essentially local in nature or function than community fire departments, volunteer or paid, operated by village, town, city or fire district, although most communities have facilities of interstate commerce and for the production of goods for commerce within their boundaries.

Likewise, these communities are like oversized mill villages, no more and no less necessary to the plant, for that is the only reason for the mill villages. Most mill villages contain the company offices and some facilities related to production. Yet the Congress and the Administrator recognize that those who maintain and guard the same are engaged in an essentially local activity, i.e., the needs of every day living.

The Court of Appeals distinguishes the case at bar from mill village cases where firemen and maintenance employees were held not "necessary" to the production of goods for commerce, such as *Wilson v. Reconstruction*

Finance Corp., (5 Cir., 1947, 158 F.(2d) 564; cert. denied, 331 U.S. 810, and *Morris v. Beaumont Mfg. Co.*, (D.C., S.C. 1947), 84 F. Supp. 909, upon the ground that certain administrative offices are within the communities in the case at bar. In the *Callus* case, *supra*, the maintenance employees were held not "necessary" to the production of goods for commerce although 42% of the building was occupied by those engaged in the production of goods for commerce, because the employer was engaged in a local business, operating an office building. Likewise in the present case, in operating the fire department, General Electric engaged in a predominantly local activity, and not more than 2% of the communities was related to production of goods for commerce.

The questions unanswered by either the District Court of the Court of Appeals are these: (1) Is the operation of a community fire department generally a local activity not covered by the Act; and, (2) If it is such a local activity, does the fact that approximately 2% of the community is related to production of goods for commerce make the firemen's occupation "closely related" and "directly essential" to the production of such goods?

The principles here involved will have wide application, affecting the overtime and minimum wages of many, and the answers thereto are dependent upon the construction of the intent of Congress under the amended section, which has never been passed upon by this Court.

The Court of Appeals, on petitioner's second primary contention, held the case at bar governed by *Borden Co. v. Borella,* 325 U.S. 679, 65 S. Ct. 1223, 89 L. Ed. 1865, the second building case. In that case, the Borden Company owned and operated the 24-story office building; in this case General Electric owns no part of Richland and North Richland or the community fire department, although it acts as rental agent for the Government's real property and operates the fire department for it. (R. 317). In the *Borden* case the Company occupied 58% of the total rentable area; in this case, facilities related to production of goods for commerce do not exceed 2% of the total of these communities from the fire protection standpoint.

The burden of proof was on the firemen to show that they were both closely related and directly essential to the production of gods for commerce. *Warren-Bradshaw Drilling Co. v. Hall,* 317 U.S. 88, 63 S. Ct. 125, 87 L. Ed. 83. The duties of firemen were, of course, two-fold—protection of life and property.

The only evidence as to persons related to such production of such goods was that 1,000 to 2,000 General Electric employees were employed in the 700 Area located in Richland. (R. 176). These were executive and administrative offices. Taking the median of 1500 persons, working a 40 hour week, and comparing it with the duty of protecting 30,000 persons, 24 hours per day and 7 days

per week, it would appear that protection of these 1500 persons constituted 1⅛% of the firemen's whole duty.

From the standpoint of protection of property, the facts are much less clear. The 700 Area occupies about 40 acres of these compact, planned communites. (R. 178, 295). It houses offices of General Electric, the Commission and other government agencies. (R. 457). There was no evidence as to what percentage of it was occupied by General Electric. If we assume for the sake of argument that all of it was occupied by General Electric, it still does not represent any great proportion of 4480 acres in the communities—.89 of 1% is all. There is also a plant bus terminal within Richland of a lesser area with two buildings upon it. (R. 300). Kadlec Hospital, the community hospital for these 30,000 persons, is located in Richland and it does some plant physical examinations, but there is no evidence again as to what part of its function this represents. (R. 300). There is also evidence the General Electric has some office space in the 101 building in North Richland, but there is no evidence as to how much or for what purpose. (R. 128, 145, 146). It is pure speculation to attempt to say what portion of the communities these represent under the evidence, but, if the 700 Area were wholly occupied by General Electric, and one assumed General Electric's other facilities were equal thereto, which they clearly are not, still they would amount to but 1.78% of the whole of these communities.

We cannot be brief and analyze in detail the other facts relied on by the Court of Appeals, but let us give some samples therefrom. The firemen in the District Court had alleged and sought to prove that they were also engaged in interstate commerce. (R. 5). The District Couprt found that the firemen did protect instrumentalities of commerce, to-wit: a railroad, a telephone exchange, an express depot, and bus and freight terminals. (R. 95). The District Court refused to find or conclude that the firemen were thereby engaged in interstate commerce, there was no proper appeal therefrom, and it is a totally different problem than that of production of goods for commerce. *McLeod v. Threlkeld*, 319 U.S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538. Yet, the Court of Appeals relied on these instrumentalities of commerce to show that the firemen were closely related and directly essential to the production of goods for commerce. (R. 457, 458).

There are other examples, such as the Commission airport, which is used only by Government planes (R. 218); or the warehouse in North Richland, with no evidence as to who owned it or operated it, or that it was in operation at all, or, if so, for what purpose; or the lumber yard at North Richland, with no evidence as to who owned or operated it or for what purpose. (R. 126). The evidence does not disclose whether such lumber yard was a retail yard, which would not be covered by the Act, government surplus left from the Manhattan Engineering Project, or for new construction, which would not be covered by the Act. The evidence does not connect these

with General Electric nor the production of goods for commerce.

The Court of Appeals was of the opinion that the community firemen served in a standby capacity to protect the barricaded production areas. (R. 463). The firemen had so alleged and argued, but the District Judge, on very substantial and convincing evidence, found the production areas were protected by a separate plant fire department and that the communities were protected by a separate community fire department. (R. 5, 7, 93). Under Rule 52 (a), Federal Rules of Civil Procedure, these findings were binding on the appellate court unless clearly erroneous.

Following the first building case, *Kirschbaum v. Walling*, 316 U.S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638, the Administrator, for enforcement purposes, adopted the rule that maintenance employees would be regarded as covered by the Act if 20% of the total rentable area of a building was occupied by tenants substantially engaged in production of goods for commerce. Release P.R.-19 (rev.), Nov. 19, 1943, Wage & Hour Division, U. S. Department of Labor. This test was used by the Courts. *Fleming v. Post*, (Cir. 2, 1944) 146 F.(2d) 441; *Asselta v. 149 Madison Ave. Corp.* (D.C. N.Y., 1946) 65 F. Supp. 385; *Ullo v. Smith*, (Cir 2, 1949), 177 F.(2d) 101; and *Gangi v. D. A. Schulte, Inc.*, (Cir. 2, 1945), 150 F.(2d) 694, affirmed, 328 U.S. 108, 66 S. Ct. 925, 90 L. Ed. 1114. In the latter case this Court, at footnote 15, notes that no question was

raised as to the soundness of the 20% rule and the question was passed without inquiry. This is an opportune time to pass upon it. It is submitted that it is a sound, practical and reasonable rule of thumb in such cases and that, judged by the 20% rule, these firemen were not "necessary" to the production of goods for commerce, let alone "closely related" and "directly essential." In *10 East 40th Street Building, Inc. v. Callus,* 325 U.S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806, this Court recognized that such lines were a necessity and in the nature of things were required to be somewhat arbitrary.

This Court has never drawn the line between substantial and insubstantial. We know that "nearly all", 58% and 99% are substantial. *Kirschbaum v. Walling,* 316 U.S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638; *Borden Co. v. Borella,* 325 U. S. 679, 65 S. Ct. 1223, 89 L. Ed. 1865; *Roland Electric Co. v. Walling,* 326 U.S. 657, 66 S. Ct. 413, 90 L. Ed. 383. The Administrator and lower courts have thought 20% a reasonable dividing line between substantial and insubstantial. Whether this 20% rule be sound or not, this Court should indicate where such line ought to be.

The problems presented by this case have wide application and effect the coverage for many, both as to minimum wages and overtime compensation under this Act.

II. The District Court's Finding Was a Finding Of Fact Not Subject to Reversal Unless Clearly Erroneous.

The District Court found, in part, as follows:

> "That at all material times claimants were employed as firemen on said community fire department at a fixed monthly wage, which varied from time to time, and worked on a two-platoon system under which a fireman was at the fire station on call for a 24-hour shift, off 24 hours, and with each sixth shift off. That under such two-platoon system, claimants worked a fluctuating work week. That all of claimants' time for each 24-hour shift spent at a fire station was working time, less 8-hours sleeping time, plus any time spent during such 8-hours sleep-time on alerts, alarms or telephone watches. That claimants had adequate facilities and reasonable opportunity for 8 hours sleep . . ." (R. 94).

The Court of Appeals held as follows:

> "The ultimate determination of whether or not sleeping time is work time present a mixed question of law and fact. In reviewing such a mixed question we may substitute our judgment for that of the trial court. *Bell v. Porter*, 7 Cir. 1946, 159 F.(2d) 117, Cert. denied 330 U.S. 813 . . ." (R. 470-471).

The substitution of the Court of Appeal's judgment for the finding of the trial court is in conflict with the decisions of this Court and of other Courts of Appeal.

In *Skidmore v. Swift*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124, a case involving sleeping time of firemen under the Fair Labor Standards Act of 1938, as amended, this Court held as follows:

> "Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court."

This firemen's case, taken in conjunction with that part of Rule 52 (a), Federal Rules of Civil Procedure, which provides as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses."

presents a direct conflict with the decision of this Court, for Court of Appeals did not hold that the findings were not appropriate or were inadequate or not supported by substantial evidence. It merely held, in effect, that it did not agree with the findings and was free to substitute its own.

The ruling of the Court of Appeals is likewise in direct conflict, in principle, with the opinion of this Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515, involving the issue of compensability of time spent walking from the time clock to place of work. This Court held that the master's findings that such time was not work time were supported by substantial evidence, were not clearly erroneous, and that the District Court erred in failing to accept such finding under Rule 53(e)(2) of the Rules of Civil Procedure, which provides, in part, "the court shall accept the master's findings of fact unless clearly erroneous," which is directly comparable to Rule 52(a) here involved.

The holding that the finding of the District Court is a mixed question of law and fact for which the Court of Appeals may substitute its own judgment, is likewise conflicting with the following decisions in other circuits rendered under the Fair Labor Standards Act of 1938, as amended.

In *Tennessee Coal, Iron & Railroad Co. v. Muscoda,* (5 Cir. 1943) 135 F.(2d) 320, Affirmed 321 U.S. 590, 64 S. Ct. 698, 88 L. Ed. 949, the Circuit Court held as follows:

> "The Act was drafted for application on a national scale, and it does not undertake to define what is working time in any particular industry or class of industries. What constitutes working time is a question of fact depending upon the particular circumstances, and is a matter for the determination of courts in controverted cases . . . and, as in other cases, the appellate court is controlled by the rule that the findings of the trial court upon decisive questions of fact must be upheld unless it is clearly erroneous."

Dumas v. King, (8 Cir. 1946), 157 F.(2d) 463;
Bridgman v. Ford, Bacon & Davis, (8 Cir. 1947), 161 F.(2d) 962;
Central Missouri Tel. Co. v. Conwell, (8 Cir. 1948), 170 F.(2d) 641.

The case of *Bell v. Porter,* (7 Cir. 1946), 159 F.(2d) 117, relied on by the Court of Appeals in the case at bar, has not been cited in this connection since, and if it can be sustained on any ground, it is only upon the ground that the particular finding there involved was conclusory in nature.

It would seem to us that the doctrine of *Bell v. Porter, supra,* now confirmed by the case at bar, as applied by the Court of Appeals in the case at bar, is in direct conflict with the opinions of this Court and with those of the Courts of Appeal in the 5th and 8th Circuits. The weight of authority and sound legal reasoning are contrary to the holding in this case that the question of what is compensable working time is a mixed question of fact and law and that, therefore, the appellate court may substitute its judgment for that of the trial court. This is a dangerous and conflicting holding which ought not to be allowed to stand, for it goes to the very heart of appeals in such cases and to the right to have the question submitted to a jury at the trial below.

CONCLUSION

For the foregoing reasons, General Electric Company prays that this petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

Title 29, U. S. C.

(Fair Labor Standards Act, as Amended)

Sec. 203(j), before amendment, provided:

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any process or occupation necessary to the production thereof, in any State."

Sec. 203(j), after amendment, provides:

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

Sec. 207(a) provides in part:

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess . . . (thereof) . . . at a rate not less than one and one-half times the regular rate . . ."

APPENDIX B

A bulletin concerning coverage and interpretation of the Fair Labor Standards Act, as amended in 1949, *15 Federal Register 2925, Section 776.17, 3 CCH, Labor Law Reporter, p. 21,039-11, Para. 24,102.17*, was made effective on May 17, 1950.

"Sec. 776.17 Employment in a 'Closely Related Process or Occupation Directly Essential to' Production of Goods.—

"(a) COVERAGE IN GENERAL. Employees who are not actually 'producing . . . or in any other manner working on' goods for commerce are, nevertheless, engaged in the 'production' of such goods within the meaning of the Act and therefore within its general coverage if they are employed 'in any closely related process or occupation directly essential to the production thereof, in any State.' Prior to the Fair Labor Standards Amendments of 1949, this was true of employees engaged 'in any process or occupation necessary to the production' of goods for commerce. The Amendments deleted the word 'necessary' and substituted the words 'closely related' and 'directly essential' contained in the present law. The words 'directly essential' were adopted by the Conference Committee in lieu of the word 'indispensable' contained in the Amendments as first passed by the House of Representatives. Under the amended language an employee is covered if the process or occupation in which he is employed is both 'closely related' and 'directly essential' to the production of goods for interstate or foreign commerce.

"*The legislative history shows that the new language in the final clause of section 3 (j) of the Act is intended to narrow,* and to provide a more precise guide to, *the scope of its coverage with respect to employees* (engaged neither 'in commerce' nor in actually 'producing or in any other manner work-in on' goods for commerce) *whose coverage under the Act formerly depended on whether their work was 'necessary'* to the production of goods for commerce. *Some employees whose work might meet the 'necessary' test are now outside the coverage of the Act because their work is not 'closely related' and 'directly essential' to such production;* others, however, who would have been excluded if the indispensability of their work to production had been made the test, remain within the coverage under the new language.

"The scope of coverage under the 'closely related' and 'directly essential' language is discussed in the paragraphs following. In the light of explanations provided by managers of the legislation in Congress, including expressions of their intention to leave undisturbed the areas of coverage established under court decisions containing similar language, this new language should provide a more definite guide to the intended coverage under the final clause of section 3 (j) than did the earlier 'necessary' test. *However, while the coverage or non-coverage of many employees may be determined with reasonable certainty, no precise line of inclusion or exclusion may be drawn; there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions of the courts.*

"(b) MEANING OF 'CLOSELY RELATED' AND 'DIRECTLY ESSENTIAL'. *The terms 'closely related 'and 'directly essential' are not susceptible of precise definitions;* as used in the Act they together

describe a situation in which, under all the facts and circumstances, the process or occupation in which the employee is employed bears a relationship to the production of goods for interstate or foreign commerce (1) which may reasonably be considered close, as distinguished from remote or tenuous, and (2) in which the work of the employee directly aids production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of an employer's operations in producing such goods.

"*Not all activities that are 'closely related' to production will be directly essential to it, nor will all activities 'directly essential' to production meet the 'closely related' test.* For example, employees employed by an employer in an enterprise, or portion thereof, which is devoted to the production of goods for interstate or foreign commerce will, as a general rule, be considered engaged in work 'closely related' to such production, *but some such employees may be outside the coverage of the Act because their work is not 'directly essential' to production of the goods.* (For a discussion of this point and specific illustrations, see Sec. 776.18 (b)). *Similarly, there are some situations in which an employee performing work 'directly essential' to production* by an employer other than his own may not be covered because the kind of work and the circumstances under which it is performed show the employee's activities *to be so much a part of an essentially local business operated by his employer that it would be unrealistic to consider them 'closely related' to the productive activities of another.* (For a more detailed discussion and specific illustrations, see Sec. 776.19 (Para. 24,102.19).

"(c) DETERMINING WHETHER ACTIVITIES ARE 'CLOSELY RELATED' AND 'DIRECTLY ESSENTIAL.' (1) The close relationship of an activity to production, which may be tested by a

wide variety of revelant factors, is to be distinguished from its direct essentiality to production, which is dependent solely on considerations of need or function of the activity in the productive enterprise. The words 'directly essential' refer only to the relationship of the employee's work to production. Work 'directly essential' to production remains so no matter whose employee does it and regardless of the nature or purpose of the employer's business. It seems clear, on the other hand that the criteria for determining whether a process or occupation is 'closely related' to production cannot be limited to those which show its closeness in terms of need or function. *It may also be important to ascertain, for instance, whether the activity of the employee bears a relationship to production which is close in terms either of the place or the time of its performance, or in terms of the purposes with which the activity is performed by the particular employer through the employee, or in terms of relative directness or indirectness of the activity's effect in relation to such production, or in terms of employment within or outside the productive enterprise.* (Examples of the application of these principles may be found in Secs. 776.18 (Para. 24,102.18) and 776.19 (Para. 24,102.19).

"(2) The determination of whether an activity is closely or only remotely related to production may thus involve consideration of such factors, among others, as the *contribution which the activity makes to the production; who performs the activity; where, when and how it is performed in relation to the production to which it pertains; whether its performance is with a view to aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question;* and, in an appropriate case, the characteristics and pur-

poses of the employer's business. Moreover, in some cases where particular work 'directly essential' to production is performed by an employer other than the producer, the degree of such essentiality may be a significant factor in determining whether the work is also 'closely related' to such production. (See Sec. 776.19).

"No one of the factors listed above is necessarily controlling, and other factors may assume importance. Some may have more significance than others in particular cases, depending upon the facts. They are merely useful guides for determining whether the total situation in respect to a particular process or occupation demonstrates the requisite 'close and immediate tie' to the production of goods for interstate or foreign commerce. It is the sum of the factors relevant to each case that determines whether the particular activity is 'closely related' to such production.

"The application of these principles is further explained and illustrated in section 776.18 and 776.19, below.

"(3) In determining whether an activity is 'directly essential' to production, a practical judgment is required as to whether, in terms of the function and need for such activity in successful production operations, it is 'essential' and 'directly' so to such operations. *These are questions of degree, even 'directly' essential activities (for example, machinery, repair, custodial, and clerical work in a producing plant)* (for other examples, see Secs. 776.18 (a) (Para. 24,102.18 (a) and 776.19 (Para. 24,102.19)) *will vary in the degree of their essentiality* and in the directness of the aid which they provide to production. An activity may be 'directly essential' without being indispensable in the sense that it cannot be done without; *yet some activities which, in a long*

chain of causation, might be indispensable to production, such as the manufacture of brick for a new factory, or even the construction of the new factory itself, are not 'directly' essential. An activity which provides something essential to meet the *immediate needs of production,* as, for example, the manufacture of articles like machinery or tools or dies for use in the production of goods for commerce (See Sec. 776.19 (b) will, however, be no less 'directly' essential because intervening activities must be performed in the distribution, transportation, and installation of such products before they can be used in production.

"The application of these principles is further explained and illustrated in sections 776.18 and 776.19 following:

"Sec. 776.18 EMPLOYEES OF PRODUCERS FOR COMMERCE.—

"(a) COVERED EMPLOYMENTS ILLUSTRATED. Some illustrative examples of the employees employed by a producer of goods for interstate or foreign commerce who are or are not engaged in the 'production' of such goods within the meaning of the Act have already been given. Among the other employees of such a producer, doing work in connection with his production of goods for commerce, who are covered because their work, if not actually a part of such production, is 'closely related' and 'directly essential' to it, are such employees as bookkeepers, stenographers, clerks, accountants and auditors, employees doing payroll, timekeeping and time study work, draftsmen, inspectors, testers and research workers, industrial safety men, employees in the personnel, labor relations, advertising, promotion, and public relations activities of the producing enterprise, work instructors, and other office and white collar workers; employees maintaining,

servicing, repairing or improving the buildings, machinery, equipment, vehicles, or other facilities used in the production of goods for commerce, and *such custodial and protective employees as watchmen, guards, firemen, patrolmen,* caretakers, stockroom workers, and warehousemen; and transportation workers, bringing supplies, materials, or equipment to the producer's premises, removing slag or other waste materials therefrom, or transporting materials or other goods, or performing such other transportation activities, as the needs of production may require. These examples are intended as illustrative, rather than exhaustive of the group of employees of a producer who are 'engaged in the production' of goods for commerce, within the meaning of the Act, and who are therefore entitled to its wage and hours benefits unless specifically exempted by some provision of the Act.

"(b) EMPLOYMENTS NOT DIRECTLY ESSENTIAL TO PRODUCTION DISTINGUISHED. *Employees of a producer of goods for commerce are not covered as engaged in such production if they are employed solely in connection with essentially local activities which are undertaken by the employer independently of his productive operations or at most as a dispensable, collateral incident to them and not with a view to any direct function which the activities serve in production.* It is clear, for example, that an employee would not be covered merely because he works as a domestic servant in the home of an employer whose factory produces goods for commerce, even though he is carried on the factory payroll. *To illustrate further, a producer may engage in essentially local activities as a landlord, restauranteur,* or merchant in order to utilize the opportunity for separate and additional profit from such ventures or to provide a convenient means of meeting personal needs of his employees. *Employees exclusively employed in such activities of*

the producer are not engaged in work 'closely related' and 'directly essential' to his production of goods for commerce merely because they provide residential, eating, or other living facilities for his employees who are engaged in the production of such goods. Such employees are to be distinguished from employees like cooks, cookees, and bull cooks in isolated lumber camps or mining camps, where the operation of a cookhouse may in fact be 'closely related' and 'directly essential' or indeed, indispensable to the production of goods for commerce. "Some specific examples of the application of these principles may be helpful. *Such services as watching, guarding, maintaining or repairing the buildings, facilities, and equipment used in the production of goods for commerce are 'directly essential' as well as 'closely related' to such production as it is carried on in modern industry. But such services performed with respect to private dwellings tenanted by employees of the producer, as in a mill village, would not be 'directly essential' to the production merely because the dwellings were owned by the producer and leased to his employees.* Similarly, employees of the producer or of an independent employer who are engaged only in maintaining company facilities for entertaining the employer's customers, or in providing food, refreshments, or recreational facilities, including restaurants, cafeterias and snack bars, for the producer's employees in a factory, or in operating a children's nursery for the convenience of employees who leave young children there during working hours, would not be doing work 'directly essential' to the production of goods for commerce." (Emphasis supplied).

APPENDIX C

LEGISLATIVE HISTORY OF 1949 AMENDMENTS

Senate Bill 653, as reported by the Labor Committee of the Senate, was amended on the floor and passed as a substitute for H. R. 5856, already approved by the House. The Senate and House versions of H. R. 5856 were then sent to a Conference Committee. The House Manager's Statement on that conference is part of the legislative history of the Act, H. R. Report No. 1453, 81st Congress, 1st Session, October 17, 1949. In so far as that Statement contains anything pertaining to this case, it is as follows:

> "*Produced.*—The House bill amended the definition of 'produced' in section 3(j) by inserting the words 'closely related' before the words 'process or occupation' and substituting the word 'Indispensable' for the word 'necessary'. The Senate amendment left the definition of 'produced' as contained in the present law unchanged. The bill as agreed to in conference follows the House bill except that the words 'directly essential' are substituted for the word 'indispensable'.
>
> "Coverage under the act for a large category of employees is determined by the definition of the term 'produced'. The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers any employee 'producing, manufacturing, mining, handling, transporting, or in any other manner working on . . . goods.' Thus the first part covers employees engaged in actual production activities as opposed, for example, to employees en-

gaged in maintenance, clerical, or custodial work. The second part of the present definition, covering any employee engged in *'any* process or occupation *necessary* to the production' of goods, has been interpreted by the Administrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. It has made no difference that the merchants sell their goods locally and that such goods do not become a part or ingredient of the goods produced by any of their customers *(McComb v. Deibert* (E.D. P. 1949), 16 Labor Cases Par. 64,982). The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory *(McComb v. Factory Stores,* 81 F. Supp. 403 (N.D. Ohio, 1948)).

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases. On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce. Employees engaged in such maintenance, custodial, and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce.

"The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce *(Kirschbaum v. Walling,* 316 U.S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. Likewise, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act. All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce.

"The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:

"1. A local fertilizer company engaged in selling all of its fertilizer to local farmers within the State for use on land on which sugarcane is grown, which cane is then sold to sugar mills within the State and processed into raw sugar which is sent out of the State *(McComb, Administrator v. Super-A Fertilizer Works,* 165 F.(2d) 824 (C.C.A. 1)).

"2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded *(Schroeder v. Clifton,* 153 F.(2d) 385 (C.C.A. 10); cert. den., 328 U.S. 858).

"3. Employees of a local window-cleaning company doing business wholly within the State but many of whose customers are engaged in interstate commerce or in the production of goods for interstate commerce *(Martinac v. Michigan Window Cleaning Company,* 327 U.S. 173: reh'g den., 327 U.S. 816).

"4. Employees of a local independent nursery concern whose duties include mowing the lawn around the plant of a customer within the State engaged in producing goods for interstate commerce (1944-45 W.H. Man., p. 125).

"5. Employees of a local architectural firm whose activities include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce (1944-45 W.H. Man., pp. 138-139).

"6. Employees of a local exterminator service firm, who work wholly within the State exterminating roaches and other pests in private houses, apartments, hotels, barber shops, colleges, hospitals, and also in buildings within the State used to produce goods for interstate commerce (3 CCH, Labor Law Reporter, 4th ed., No. 25,150.385).

"All such employees, as well as the employees of the merchant selling his goods locally *and employees engaged in providing residential, eating, or other living facilities for factory workers,* are quite clearly not performing any activities that are closely related or directly essential to the production of goods." (Emphasis supplied).

MAR 1 1 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 599

GENERAL ELECTRIC COMPANY,
a Corporation,
Petitioner,

vs.

AVERILLE L. PORTER,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:

At the time the petition for certiorari was filed in the case at bar the decision in *Van Dyke v. Bluefield Gas Company*, United States Court of Appeals, Fourth Circuit, No. 6709, February 16, 1954, 25 CCH Labor Cases Para.

68,161, was unreported. It is in direct conflict with the case at bar, on almost identical facts, on the issue of whether sleeping time is compensable work time. In that case a night watchman was required to stay on the company premises from 5:00 o'clock P.M. until 7:00 o'clock A.M. seven days a week and was paid a wage of $150.00 per month. There was no agreement as to what hours should be considered compensable time worked, but the watchman was free to go to sleep at 10:00 o'clock P.M. There was evidence of eighteen interruptions during sleeping hours in some eighty weeks—about the same as the average in the case at bar. The court found there was reasonable opportunity and adequate facilities for sleep and that six hours of each fourteen hours was not work time, the exact basis of the trial court's finding in the case at bar. The Circuit Court of Appeals rejected the argument that the test was whether the principal duty of the employee was to stand by and be available, the very ground adopted by the Court of Appeals in reversing the Trial Court in the case at bar. Since the case is not yet reported we quote the pertinent part of the opinion as follows:

> The District Court found that Appellant acquired his daily sleep while on the appellee's premises and it reasonably fixed Appellant's sleeping requirements at six hours per night. The Court therefore found that of the 14 hours per day spent on the Company premises by Appellant, six of these were available to be devoted to sleep, and that Appellant was not entitled to pay for these six hours unless he was disturbed regularly in his sleep.

The only evidence submitted in point of disturbances showed that, during the nearly two years of Appellant's employ, only 18 telephone calls were received at the Company service plant between 10:00 P.M. and 7:00 A.M. On the basis of this evidence the District Court found that Appellant:

> " . . . was disturbed on rare occasions and that the occasions on which he was disturbed cannot be fixed with any degree of certainty but inasmuch as there was a margin over and above his sleeping time and the maximum hours per week that the Wage and Hour Law provides, I find that that time above the maximum was sufficient to account for all the extra and emergency duties he was required to perform during the night."

Appellant, citing *Dumas v. King,* 8 Cir., 157 F. (2d) 463 and *Super Cold Southwest Co. v. McBride,* 5 Cir., 124 F.(2d) 90, contends that the test of compensability for idle time spent on an employer's premises is whether the principal duty of the employee was to stand by and be available. The Supreme Court has upheld, however, the rule that sleeping time is not compensable. *Bell v. Porter,* 66 F. Supp. 49, reversed 159 F.(2d) 117, cert. granted 330 U. S. 817, vac. 330 U. S. 813, rehearing denied 331 U. S. 864. Other Federal courts have likewise held that adequate sleeping time is not compensable under the Act. *Bowers v. Remington Rand, Inc.,* 159 F.(2d) 114; *Rokey v. Day & Zimmerman,* 157 F.(2d) 734.

The Supreme Court has also said that it is impossible to lay down an arbitrary rule regarding sleeping time which may be compensable, and the determination of whether time so spent is or is not working time depends on the facts of each particular case. *Armour & Co. v. Wantock,* 323 U. S. 126; *Skidmore v. Swift & Co.,* 323 U. S. 134. It is the position of Appellant that the primary circumstance governing

the determination to exclude or include sleeping time as compensable in a showing of whether suitable sleeping facilities were provided, citing *Howard v. Southern Continental Telephone Co.*, 72 F. Supp. 276.

> The record shows that Appellant was furnished a room with a bed, heater and telephone; that he had the added facilities of a wash basin and toilet nearby; and that he agreed, without apparent protests, to furnish his own bedclothes. We cannot say that such facts fall short of substantiating the District Court's finding of adequate facilities, despite Appellant's stress upon the lack of a bathtub, upon the dangerous type of heater furnished, and upon the general dirtiness of the quarters. It is quite significant that, during the entire time of his employment, Appellant never made any complaint to his employer about the facilities given to him. We, therefore, agree with the District Judge that Appellant was not entitled to pay for his daily sleeping time during either the summer or winter months.

Petitioner respectfuly requests that this Court consider this additional case in support of its petition for certiorari, since it was not yet available when the original petition was transmitted to the Clerk.

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HILTON B. GARDNER,
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LUCILE LOMEN,
Attorneys for Petitioner.

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MAR 23 1954

HAROLD B. WILEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 599

GENERAL ELECTRIC COMPANY,
a corporation,
Petitioner,

vs.

AVERILLE L. PORTER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Averille L. Porter, Respondent, prays that the petition of General Electric Company for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on December 7, 1953, be denied.

OPINION BELOW

Petitioner's statement is correct.

JURISDICTION

Petitioner's statement is correct concerning the jurisdictional facts, but the petitioner has failed to comply with Rule 38 (2) in its reference to Rule 12 (1), which requires the jurisdictional statement to set forth the grounds upon which it is contended that the questions involved are substantial.

THE QUESTIONS PRESENTED

The petitioner presents its questions in the light of its own interpretation of the evidence. If respondent were to re-phrase the questions to make them more objective, he would delete the word, "community," used to modify the word, "firemen," in both questions, since it is a weighted word implying only local activity on the part of the firemen, contrary to the evidence, which showed their involvement in interstate commerce activities.

STATUTES, REGULATIONS AND LEGISLATIVE HISTORY INVOLVED

Respondent adds the following relevant items: In Appendix A hereto annexed, Administrative Bulletin of the Wage & Hour Administrator, 15 F. R.

2925, Section 776.19 (b) and Section 776.18 (a) Note 4. In Appendix B, Statement by a Majority of the Senate Conferees regarding the amendment of Section 203 (j) of the Fair Labor Standards Act as amended, set forth in Vol. 1, p. 10,257, Prentice-Hall Labor Equipment, 95 Cong. Rec. 15,372-377, Oct. 19, 1949.

STATEMENT

The following facts are added to petitioner's statement by way of clarification and correction:

Richland and North Richland are not municipalities, but are towns owned by the United States and operated by the General Electric Company under the prime contract for operation of the Hanford Works. (Pl. Ex. 5).* The fire companies here involved are not municipal fire departments. If they were, they would be exempt from the provisions of the Fair Labor Standards Act. (29 U.S.C. 203 (d).)

A crucial fact omitted by petitioner is that the firemen never agreed to the hours and working conditions here involved. The employer changed them, without their consent and over their protests, from an 8-hour day and a 40-hour week with a good rate of hourly pay and time-and-one-half for overtime, to a monthly salary basis and a life on the fire station

* R. 118. Exhibits not printed, see R. 449, 481.

premises in 24-hour shifts averaging 72 hours per week per man, with no overtime whatever. One-fourth of the weeks were 96-hour weeks with the lowest paid employees receiving less than the 75 cents per hour minimum set by the Fair Labor Standards Act.

The firemen claimants never alleged (as petitioner implies) that there was no plant fire department. The claimants did allege and prove that the Richland and North Richland fire departments not only served the two towns, with all that was in them, but that they also acted as a stand-by force for the production plant in case of emergency. (R. 131, 145, 163, 200-201, 206-208, 255-56, 260, 373-77).

The reference to pages 373-77 is to the undisputed testimony of Fire Chief Olson, General Electric's witness, on direct examination. The Trial Court did not find this evidence untrue, but made no finding as to such stand-by duty, resting coverage under the Fair Labor Standards Act upon the fact he did find, that the firemen guarded the administrative portions of the Hanford Works, which is sufficient, but was not the only reason on which he might have decided the case. The Court of Appeals referred to this testimony, accepting it as true and significant. (R. 463).

The prime contract, Plaintiff's Exhibit 5*, makes it clear that General Electric Company was, in the operation of the Hanford plant, an independent contractor, and Article VI, Section 4, of the contract, declares all employees to be employees of the Contractor, not of the United States. General Electric Company has conceded (before argument in the Court of Appeals) that it is engaged in the production of goods for interstate commerce. (R. 459).

The facts set out by the Court of Appeals (R. 455-58) are quite comprehensive as to the physical factors involved in the protection of the two towns, and include the fact, not stated by petitioner, that the two towns were built expressly to house and care for the needs of the plant employees. (R. 462).

Interstate commerce facilities in the two towns were guarded by the firemen (R. 95) and were utilized by General Electric Company in the operation of the Hanford Works. (R. 462). These consisted of a railroad, a telephone exchange, an express depot, bus and freight terminals, a post office and an airport. (R. 95 and 462).

The District Court and the Court of Appeals both held that the firemen were engaged in an occupation closely related and directly essential to the production of goods for commerce and hence were

* R. 118

covered by the Fair Labor Standards Act of 1938, as amended. (R. 93-94, 461-463).

The District Court held that all of each 24-hour shift except 8 hours of sleeping time (minus alerts, alarms and telephone watches in those hours) was time worked—in other words, all stand-by and eating time. (R. 94).

The Court of Appeals added the sleeping time as working time. (R. 473).

The District Court found (R. 94) that the claimants had adequate facilities and reasonable opportunity for 8 hours sleep. The Court of Appeals held that those factors were not, of themselves, determinative of the question, but that all the circumstances should be considered, the contract examined and cases from other Circuits scrutinized and compared or distinguished, because "the ultimate determination of whether or not sleeping time is work time presents a mixed question of law and fact." (R. 470-75).

The judgment was affirmed except as to the disallowance of sleeping time as work time, and as to that was remanded for correction. (R. 478).

SPECIFICATION OF ERRORS

Petitioner has formulated no specification of errors.

REASONS FOR DENYING THE WRIT

Preliminary Summary of Respondent's Reasons

1. The jurisdictional statement is incomplete.

2. There is no specification of errors.

3. There is no conflict of decisions as to substantive law.

4. There is no conflict of decisions as to procedure.

5. There is no conflict with the decisions of the Supreme Court.

6. There is no question of importance to numerous other litigants or to the public in general; no question of constitutional or international significance; no large sum of money involved.

7. The decision was right and substantial justice was done.

ARGUMENT ON REASONS FOR DENYING THE WRIT

1. JURISDICTION

The jurisdictional statement is incomplete. Rule 38 (2) in referring to Rule 12 (1) requires the jurisdictional statement to set forth the grounds upon which it is contended that the questions involved are

substantial. There is no such statement in the jurisdictional section of the petition (p. 2). Furthermore, such references to substantiality as are made in the petitioner's argument (p. 16, last paragraph; p. 21, last paragraph) are no more than bare assertions and give no grounds for the contention that the principles involved here will have wide application. This rule places the burden upon the petitioner to show substantiality. Even in a case where a constitutional question is raised, this Court will decline jurisdiction when it appears that the question presented is not substantial in character. **Zucht v. King,** 43 S. Ct. 24, 260 U.S. 174.

2. SPECIFICATION OF ERRORS

Petitioner has formulated no specification of errors, as is required for the supporting brief annexed to the petition under Rule 38 (2), which refers to Rules 26 and 27 for guidance as to the contents of the Brief.

Rule 27 (3) requires: "A specification of such of the assigned errors as are intended to be urged."

Rule 38 (2) immediately following the reference to Rules 26 and 27, states: "A failure to comply with these requirements will be a suffficient reason for denying the petition."

On writ of error where there was no assignment of errors and no specification of the errors relied upon as required by the rule, and no "plain" error, the writ was dismissed. **Rowe v. Phelps,** 14 S. Ct. 632, 152 U.S. 87.

A ruling of the Circuit Court of Appeals not specified as error in the petition for writ of certiorari will be assumed to be correct. **Prudence Co. v. Fidelity & Deposit Co.,** 56 S. Ct. 387, 297 U.S. 198; **Sunderland v. U. S.,** 45 S. Ct. 64, 266 U. S. 226.

On application for certiorari or on appeal, the Supreme Court will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon. **Flournoy v. Wiener,** 64 S. Ct. 548, 321 U. S. 253.

3. NO CONFLICT OF SUBSTANTIVE LAW

The only conflict of law between the Circuits that is urged by petitioner is one of procedure, as to whether a Court of Appeals has a right, on a question of mixed law and fact, to consider all the circumstances, and the law, including the decided similar or related cases, and substitute its judgment for that of the trial court.

This is with reference to petitioner's second point concerning sleeping time. On its first point,

coverage, no conflict of law is shown, either substantive or procedural, between the Circuits, but only a series of cases of differing outcome due to distinguishable facts. The two courts below agreed as to firemen coverage in this case.

As we understand the rules, this Court grants certiorari not to decide obscure procedural differences or disputed facts, but only to resolve some real conflict of law where the issue is intrinsically important to many other persons or the general public. **In re Woods**, 12 S. Ct. 417, 143 U. S. 202; **Southern Power Co. v. North Carolina Public Service Co.**, 44 S. Ct. 164, 263 U. S. 508.

4. NO PROCEDURAL CONFLICT

Petitioner has shown no case holding that on a mixed question of law and fact, the Court of Appeals is **bound** by the finding of the Trial Court. Our Court of Appeals held that it was **not** so bound. To make a conflict, we would have to have a contrary holding in some other circuit.

Petitioner seeks to find a conflict in the dictum of other courts of appeal which, in deciding that sleeping time was not working time, have stated that it was a question of fact. There is nothing to show in these cases that they were dealing with the con-

struction of an **ultimate** or **conclusory** finding or that the question had been raised as to whether such a finding might be one of mixed law and fact.

The case of **Bell v. Porter,** 7th Circuit, 1946, 159 F. 2d 117, (cert. denied, 330 U. S. 813), followed on this point by the Court of Appeals of the 9th Circuit, which holding petitioner contends was wrong and created a conflict, based its decision on a previous case in the 7th Circuit, **U. S. v. Anderson,** 108 F. 2d 475. That case in turn follows and cites as authority the Supreme Court case of **Bogardus v. Commissioner of Internal Revenue,** 302 U. S. 34, 58 S. Ct. 61, where this Court held that a finding by the Board of Tax Appeals that payments to petitioners were compensation, not tax free gifts, was "a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review, and, on such review, the Court may substitute its judgment for that of the Board."

This reasoning was elaborated by this Court in **Baumgartner v. U. S.,** 64 S. Ct. 1240, 322 U. S. 665.

In **Helvering v. Tex-Penn Oil Co.,** 57 S. Ct. 569 (574), 300 U. S. 481, 81 L. Ed. 755, the same rule is announced as to the character of an ultimate finding,

and this Court proceeded to uphold the Court of Appeals which had reversed the Board of Tax Appeals. This case also is cited in **Bell v. Porter,** 159 F. 2d 117.

It appears that the Courts of Appeals for the 7th and 9th Circuits are both closely following the rules laid down by this court in distinguishing ultimate findings from evidentiary findings, and there can be no conflict with cases wherein the point was not even raised.

The same might be said as to this Court's decision in **Skidmore v. Swift & Co.,** 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124, one of the two cases in which this Court was laying down broad general principles of coverage for the guidance of courts below. The statement that whether time falls within or without the Act is a question of fact was only incidental to the decision, and the contention that coverage might be a mixed question of law and fact was not then before the Court. No doubt the Court was thinking of detailed, evidentiary findings—not an ultimate or conclusory finding. It is surely not to be concluded by counsel or litigants that this statement was meant to overrule the **Bogardus, Baumgartner and Helvering** cases cited above, or that there is a conflict in the decisions of this Court as to this point.

In the instant case, it is relevant to note that there is no Conclusion of Law on this subject by the Trial Court. (R. 96-97). Such a Conclusion of Law —that sleeping time was not working time—would have been redundant. It had already been included in Finding of Fact No. VIII, R. 94.

It should be pointed out under this heading that so far as Rule 52 (a) of the Federal Rules of Civil Procedure is concerned, requiring due regard to the opportunity of the trial court to judge the credibility of the witnesses, there is no dispute here as to the essential facts, namely, that there was no bargaining or contract for this work, that the men were on duty on the fire station premises for twenty-four hours per shift, and that the number of alerts, alarms and investigations at night, as well as telephone watches, as shown by General Electric Company's own records (Pl. Ex. 1)* was substantial. The Company's Answer (R. 28) stated that "the defendant, without prior, formal agreement with plaintiff or his assignors, put the two-platoon system into effect," and, "That on alternate days, each platoon was on the premises for twenty-four hours . . ." etc.

So none of these basic facts upon which the Court of Appeals rendered its opinion was in dispute.

* R. 117

5. NO CONFLICT WITH SUPREME COURT DECISIONS

As to both of petitioner's points, coverage and working time, the Court of Appeals carefully followed decisions of this Court, with both citation and discussion. (R. 460-475). Brevity forbids us to enumerate them, but petitioner has done so, complaining that the Courts below did not reach a conclusion satisfactory to petitioner, but not showing specifically wherein it is contended that the Courts below failed to apply properly the principles laid down by this Court. Instead, petitioner's argument seems to be that this Court should construe the 1949 Amendment to the Fair Labor Standards Act just for the sake of ruling on it and establishing a dividing line between coverage and non-coverage. (Pet. 11, 21).

But the courts below are having no difficulty in construing the 1949 Amendment, 29 U. S. C. 203 (j). Although four years have elapsed, petitioner states (Pet. 9) that at the time of argument on appeal this was a case of first impression in a Court of Appeals, although one other case has dealt with the subject since that date. Petitioner does not allege that these two cases are in conflict with each other or with the decisions of the Supreme Court, and the dearth of cases itself would indicate that the amendment is of

no great or overwhelming importance, or the subject of vast litigation, as alleged by petitioner. (Pet. 11).

It is our understanding that this Court does not grant certiorari to make declaratory judgments, and that in the absence of some error on the part of the courts below, some clear misapplication of the law already laid down by this Court, or some definite conflict between the Circuits, coupled with a question of real importance, certiorari will be denied, or dismissed if improvidently granted. **American Construction Co. v. Jacksonville T. & K.W. Ry. Co.,** 13 S. Ct. 758; **Magnum Import Co. v. Coty,** 43 S. Ct. 531, 262 U. S. 159; **Layne & Bowler Corp. v. Western Well Works,** 43 S. Ct. 422, 261 U. S. 387; **U. S. v. Rimer,** 31 S. Ct. 596, 220 U. S. 547.

This Court does not enunciate "rules of thumb" (Pet. 21), but rules of law, and we doubt, if certiorari were granted in this case, whether it would draw an inflexible "percentage of occupancy" line such as plaintiff has contended for throughout—20%—any more than it did in the case of **10 East 40th Street Building, Inc. v. Callus,** 325 U. S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806, where that question was presented and the court found other grounds for its holding against coverage of maintenance employees of a building company. It is, perhaps, significant that

both of the courts below thought so little of the argument that it was not mentioned in either decision (Pet. 12, 16). The fact remains that both courts held against the General Electric Company on the question of fireman coverage, and it is more than likely that they did so on the basis of the **importance,** not the **acreage,** of the administrative portions of the production plant located in Richland and North Richland. (R. 93, 462).

6. NO QUESTION OF GENERAL IMPORTANCE

This case is unique and turns upon its own facts. Firemen in the same situation as the claimants here must be extremely scarce. Municipal fire departments are exempt from the Act. (29 U.S.C. 203-d). "Mill villages," relics of feudalism, are, we believe, due to pass from the American scene, and a majority of them are probably incorporated towns, hence exempt from the operation of the Fair Labor Standards Act as municipalities.

It may be that this Court will take judicial notice of the publicly announced intentions of the Atomic Energy Commission to free Richland, so that it too will be a municipality ere long. Oak Ridge is operated differently as shown by the case of **Patton v. Roane Anderson,** 84 F. Supp. 72, 192 F. 2d 965, while the hydrogen bomb towns have not been operated

by government contract but the Government has let the workers find housing as best they may. (See article in Harper's Magazine, Nov. 1953, "Big Botch at Savannah River").

The Court of Appeals has shown how different is the work of these firemen from that of industrial fire companies, which are only auxiliary to the regular municipal fire departments (R. 474), whereas at Richland and North Richland these men do all the fire fighting.

But more important than any of such differentiating facts is union representation, collective bargaining, a contract. It is almost inconceivable that another case like this would arise anywhere, where the firemen were unorganized and were not consulted about a change from an eight-hour day to a twenty-four-hour day, and where it was put into effect over their protests. (R. 95, 465).

The Court of Appeals clearly pointed out to General Electric Company (and to any and all other employers who might be similarly situated) that it need not be affected by this decision as to future employment of these men. All it has to do is to make a contract with them defining what hours are to be regarded as working time—the thing the Company deliberately failed and refused even to talk about

before the two-platoon system was put into effect. (R. 95, 472). This whole case could have been avoided by a little collective bargaining, but the Company was intent only on getting sixteen hours per shift for nothing.

These points, then, are of importance only to these firemen. It is difficult to see who, of the general public, may be affected by them, except as all citizens ought to feel that their Government should abide by the same humane standards it sets by law for other employers and that Government contractors should live up to the law and to their contracts. (See prime contract, Pl. Ex. 5, Article XXIII.)* But this kind of public interest argues for denial of certiorari, not review. The courts below have held **against** unfair practices on a Government contract. It is highly improbable that this Court, on review, would do otherwise. **Powell v. U. S. Cartridge Co.**, 70 S. Ct. 755, p. 765, 339 U. S. 497.

There is no question of constitutional or international significance.

Amount Involved

The amount involved, as cases go before this Court, is paltry. The judgment for the 56 claimants amounted to only some $15,000. But the doubling of hours of working time allowed as overtime does not

* R. 118

necessarily mean that the amount of the judgment will even be doubled by the new holding. Actually, under previous decisions of this Court, commencing with **Missel v. Overnight Transportation Co.**, 316 U. S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682, and continuing with the line of cases known as the "Belo cases," if a person is on a monthly salary, as here, the longer he works, the less he receives per hour, because the regular hourly rate is determined by dividing the weekly wage by the actual number of hours worked. Then, it being considered that he has been paid for "time" in the regular wage, only half-time computed on the new, reduced hourly rate, is paid for the over-time hours.

The extra amount the firemen here may claim under the decision of the Court of Appeals will be a very small amount per man, and in the aggregate, for the vast number of extra hours obtained by the employer when it changed these employees from a forty-hour week to weeks of 48, 72 and 96 hours, an average of 72 hours per week for each man for the year covered by this suit.

The amount involved means a great deal to these claimants, but it would seem to be too small to be worthy of the attention of this Court.

7. THE DECISION WAS RIGHT

The decision of the Court of Appeals was manifestly right as to coverage and working time, and, as previously shown by reference to decisions of this Court, was correct in holding that it might re-examine a finding of mixed law and fact and substitute its judgment for that of the Trial Court. It differed from the Trial Court on only one point. In the main, they agreed.

The principle that both courts upheld is a very old one which did not originate with the Fair Labor Standards Act but was greatly strengthened by it—that the laborer is worthy of his hire, that men should be paid for time they work, and that working time is primarily time required and controlled by the employer for his own benefit. **Tennessee Coal, Iron & R. Co. v. Muscoda Local,** 321 U. S. 590, 64 S. Ct. 698.

These men, not consulted about a tremendous change in their hours and working conditions, their hours almost doubled without their consent and over their protest, (R. 95, 465), with no additional pay and no overtime, felt they had a just grievance and they started this case, which has been bitterly resisted. Two courts have vindicated their stand.

In deciding the questions of coverage and work-

ing time in favor of these firemen, the courts between them have arrived at substantial justice, and their decisions should not be subject to review, particularly when it is almost certain, in the light of its previous decisions, that this Court could only uphold the beneficent purposes of the Fair Labor Standards Act and affirm the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, Averille L. Porter prays that the petition of General Electric Company for a Writ of Certiorari be denied.

Respectfully submitted,

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BRIEF IN ANSWER TO SUPPLEMENTAL PETITION

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Supplemental petition served after printing of the foregoing BRIEF IN OPPOSITION is answered as follows:

The fact that a new case in another Court of Appeals has held that a night watchman is not working during hours allowed for sleeping time is not sufficient reason for granting review, in the light of the authorities cited in the foregoing brief. Each case turns on its own facts, as the Court said in this new case, **Van Dyke v. Bluefield Gas Company**, 25 CCH Labor Cases Par. 68, 161:

> "The Supreme Court has also said that it is impossible to lay down an arbitrary rule regarding sleeping time which may be compensable, and the determination of whether time so spent is or is not working time depends on the facts of each particular case. **Armour & Co. v. Wantock**, 323 U. S. 126; **Skidmore v. Swift & Co.**, 323 U. S. 134."

This new case does not create a genuine and serious conflict of law between the Circuits, any more than did the old cases holding contrary to the instant case and to the case of **Conwell v. Central Missouri Telephone Co.**, 170 F. 2d 641, 8th Circuit, Nov. 16,

1948, where sleeping time was allowed as compensable on the peculiar facts of the case. The Supreme Court has laid down the rules. The conclusions, in applying them to particular facts, will naturally differ. This Court cannot foresee all possible factual situations so as to determine all the cases in advance.

It appears that the case at bar is analogous to the case of **Keller v. Adams-Campbell Co.**, 44 S. Ct. 356, 264 U. S. 314, where the Court held to the rule that it will not grant certiorari to review factual issues, by saying:

> "Such an ordinary patent case, with the usual issues of invention, breadth of claims and non-infringement, this court will not bring here by certiorari, unless it be necessary to reconcile decisions of Circuit Courts of Appeal **on the same patent.** We therefore find ourselves mistaken in assuming that an important issue of general patent law, under section 4916, is here involved. The result is that an order must be entered dismissing the writ of certiorari as improvidently granted, at the costs of the petitioner." (Emphasis ours).

In **Van Dyke v. Bluefield Gas Company**, petitioner's newly cited case, it would seem that the Court of Appeals for the Fourth Circuit gave undue significance to the denial of certiorari in saying, "The Supreme Court has upheld, however, the rule that sleeping time is not compensable," citing the denial of certiorari in the case of **Bell v. Porter**, 159 F. 2d

117, CCA 7, 1946, 330 U. S. 813. No grounds for the denial were stated, and this Court has repeatedly admonished against reading reasons into such denials or construing them as expressing approval.

The facts in both of these cases are quite different from those of the case at bar, but we will not enter into the merits of the controversy at this stage of the proceeding by distinguishing the cases on the facts, nor did we do so in the foregoing brief, because we have tried to confine our argument to the reasons why a writ of certiorari should be denied.

We respectfully submit that the new case cited by petitioner does not create or give weight to an important issue of law or any disagreement on legal principles between the several Courts of Appeal, and therefore constitutes no additional argument for the granting of the writ.

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APPENDIX A

Title 29, Chapter V, Code of Fed. Reg., Part 776, 15 Fed. Reg. 2925, effective May 17, 1950, Administrative Bulletin:

Section 776.18 (a), Note 4:

"No distinction of economic or statutory significance can be drawn between such work in a building where the production of goods is carried on physically and in one where such production is administered, managed and controlled. **Borden Co. v. Borella,** 325 U. S. 679."

"Section 776.19 (b) (5). Managers of the legislation in Congress stated that all maintenance, custodial and clerical employees of manufacturers, mining companies, and other producers of goods for commerce perform activities that are both 'closely related' and 'directly essential' to the production of goods for commerce, and that the same is true of employees of an independent employer performing such maintenance, custodial, and clerical work on behalf of such producers.

"Typical of the employees in this covered group are those repairing or maintaining the machinery or buildings used by the producer in his production of goods for commerce and employees of a watchman or guard or patrol or burglar alarm service protecting the producer's premises . . ."

APPENDIX B

Statement by a Majority of the Senate Conferees on FLSA amendment to Section 203 (j), Volume 1, page 10,257 Prentice-Hall Labor Equipment, 95 Con. Rec. Oct. 19, 1949:

> "What is necessary to production has been the subject of litigation in many hundreds of cases in the courts, and varying interpretations of the meaning of the term as applied in particular fact situations may be found in the decisions. The language of the conference agreement should provide more certainty in this field. **It adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage.** (Emphasis ours).
>
> "This language is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production which may reasonably be considered close as distinguished from remote and tenuous. Its reference to activities directly essential to production does not, as did the House Bill, require that the activities be indispensable to production. Rather, the conference agreement contemplates activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient and satisfactory manner of operations which are part of an integrated effort for the production of goods. Such directly essential activities are to be distinguished from those which are only indirectly essential to production, such as the procurement of land for a new factory or the manufacture of brick for its buildings.
>
> "Typical of the classes of employees whose work is closely related and directly essential to production, within the meaning of section 3 (j) as

amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producer: (1 and 2 not applicable here).

"3. Plant guards, watchmen and other employees performing protective or custodial services for producer of goods." (Citing cases).

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IN THE

Supreme Court of the United States

October Term, 1953

No. 599

GENERAL ELECTRIC COMPANY,
a Corporation,
Petitioner,

vs.

AVERILLE L. PORTER,
Respondent.

REPLY BRIEF ON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO STATEMENT

Petitioner has never contended that Richland and North Richland were incorporated municipalities of the State of Washington, nor that the community firemen were exempt under 29 U.S.C. 203(d), which exempts such

municipalities from the Act. Petitioner has referred to Richland and North Richland as communities, as does the contract between the parties and the trial court's Findings of Fact. R. 93, Pl. Ex. 5, Article II, Section 9, R. 117. It was agreed that the firemen protected all persons and property within these two communities from hazards of fire, undisputed that the firemen received the training of ordinary municipal fire departments, and that the two-platoon system is the system most commonly used by municipal fire departments in the State of Washington. R. 232, 234, 337, 343. Thus, the duties, training, and system of employment were like those of municipal fire departments.

Both the trial court and the Court of Appeals held that, on the change-over to the two-platoon system, the firemen by continuing to work agreed to their new conditions of employment. R. 94, 95, 467. The question is neither crucial nor important in connection with this petition for *certiorari*, as the only questions raised are whether the community firemen of Richland and North Richland are both closely related and directly essential to the production of goods for commerce and the question of whether the Court of Appeals was free to ignore the findings of the trial court with regard to sleeping time and substitute its own judgment therefor. Respondent has filed no cross-petition for *certiorari* on any other issue.

Respondent unwarrantedly distorts the effect of the firemen's so-called protest. The trial court's finding was as follows:

"Prior to March 20, 1950, plaintiff firemen were working regular eight-hour shifts and were paid on an hourly basis. On said date defendant changed their employment over to the two-platoon system *as above described* without agreement with and over the protest of plaintiff firemen. However, they continued working."

(Emphasis supplied) R. 95.

The "two-platoon system *as above described*" was a two-platoon system with 24 hours on and 24 hours off. R. 94. The protest referred to in the quoted finding is in evidence as Exhibit 7 and is dated March 23, 1949, almost one year prior to the inauguration of the two-platoon system. R. 140, 141. This was a petition by some firemen for a variation of the two-platoon system under which the two platoons would rotate on the basis of a 10-hour day and 14 hours at night. It could be construed as a protest against the two-platoon system of 24 hours on and 24 hours off, although it is in the form of a request for a different variation of the two-platoon system, and is not a request for retention of an eight-hour shift. R. 360-361. The trial court in his finding construed this Exhibit 7 as a protest, not against the two-platoon system, but against the proposed 24 on and 24 off as opposed to the 10 and 14.

The respondent states at page 4 of his brief that the trial court did not pass upon the question of whether the community firemen were in a standby capacity for plant protection. This is not in accord with the facts. The respondent alleged (R. 5, 7) that the firemen were en-

gaged in guarding a portion of Hanford Works known as the 300 Area which was operational in character and proposed as Finding of Fact XI, the following:

> "A portion of the Hanford Works known as the '300 Area' is operational in character. It lies within the barricaded area. Plaintiff and his assignors were subject to call and were called to protect said '300 Area'."

This proposed finding was rejected by the trial court which instead found that the production units in the barricaded plant area were protected against the hazard of fire by the plant fire department, while the communities were protected by their separate community fire department. R. 93.

Despite the trial court's finding, the Court of Appeals found that the firemen served in a standby capacity to protect the barricaded production area. R. 456, 463.

The trial court based his finding that the firemen did not operate in a standby capacity on undisputed facts. The supervision of the plant fire department was separate and distinct from that of the community fire department; the union affiliations of the firemen were different; the plant firemen worked a 40 hour week with an hourly wage, while community firemen were on the two-platoon system with a monthly wage; and, there was no right of transfer between the departments. The plant firemen received the training of industrial firemen plus *special training on radiation hazards,* while the community fire-

men received the usual training for municipal firemen with *no* training on radiation hazard. R. 156, 157, 163, 180, 181, 200, 201, 206, 207, 211, 255, 260, 261, 309-313, 322-324, 335, 342, 343, 349, 351-353, 357, 358, 373-377.

The trial court realized that the production units at this plant were atomic piles and that to send untrained community firemen into an atomic pile with which they were unfamiliar would be gross negligence. The Court of Appeals did not agree with the trial court and substituted its own judgment because on one occasion a fire truck from North Richland, in responding to a fire call from an Army officer, went to the 300 Area by mistake but found no fire, and on a second occasion, an explosion in the 300 Area, four men with one fire truck from the community fire department went to the scene, entered a restricted building, and were promptly hospitalized for fear of radiation exposure. R. 131, 145, 147, 163, 200, 201, 206-208, 255, 256, 260-262, 351, 353, 373, 377. The latter incident, of course, emphasizes the trial court's belief that petitioner could not have intended to use untrained firemen in the atomic piles. The Court of Appeals did not state that the District Court was clearly erroneous, but again freely substituted its own judgment.

REPLY ON JURISDICTION

The jurisdictional statement is in conformity with the well-established practice and complies with paragraph 1 of Rule 12, Section 1, Rules of the Supreme Court. For

example, see: *Alaska Steamship Co. v. Petterson,* October Term 1953, No. 287, *Certiorari* granted, December 14, 1953.

REPLY TO SPECIFICATIONS OF ERROR

Rule 38(2) requires no specifications of error in the petition. Petitioner filed no brief in support of its petition.

REPLY ON IMPORTANCE

It is true that the exact factual situation in the case at bar may be unusual. This court has recognized that no formula will fit all cases and that in each case whether such sleeping time falls within or without the Act depends upon the facts of the particular case. *Skidmore v. Swift,* 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124. The facts of this case do give the opportunity to resolve important principles of wide application.

That 29 U.S.C. 203(j) affects the coverage of many under the Act for both minimum wages and overtime is readily apparent from the House Manager's Statement, Appendix C of Petition, and Sections 776.18(a) and (b) of the Administrator's Bulletin, pages 32-33 of Petition, wherein he gives some examples of covered and non-covered employment under Section 203(j). The volume of litigation under this section prior to amendment has been large, as the Congress noted. (Appendix B, Respondent's Answering Brief.)

The definition of "closely related" and "directly essential" will be of universal application. The dividing line between essentially local activities and those where Congress intended coverage under the narrowed language will have the widest application. This Court has already posed the question of the proper dividing line between substantial and insubstantial relationship of employees to production of goods but has passed the question, as it was not before it. *Gangi v. D. A. Schulte, Inc.*, 328 U. S. 108, 66 S. Ct. 925, 90 L. Ed. 1114, footnote 15.

This is a section with widespread economic effect. The principles and dividing lines on coverage involved in this case are of widespread application and the facts are such that the case lends itself to an authoritative decision.

CONFLICT

Respondent at page 10 of his Brief refers to the conflict herein as an "obscure procedural" conflict. In *Bell v. Porter*, 7 Cir. 1946, 159 F.(2d) 117, the trial court found that the sleeping time of the firemen involved was compensable working time. The Court of Appeals reversed, holding that it was free to substitute its judgment for the finding of the trial court. In the case at bar we have the reverse, the trial court finding that such sleeping time was not compensable time worked, and the Court of Appeals substituting its judgment and reversing. It appears to us that this is a sword that cuts both ways, and cuts deep. Certainly, it has had a substantial effect upon the

rights of employer and employee alike, whether it is a rule of substantive law or not.

Whatever may be the holding of the Courts with regard to gift taxes and the peculiarities found in appeals from the Board of Tax Appeals, the findings of fact by the master as to what constitutes work time under this Act in *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515, cannot be distinguished from the findings of fact by the trial Judge in the case at bar. In that case this Court held the findings could not be set aside unless clearly erroneous. If the findings of the trial court in that case are adequate and appropriate findings of ultimate fact, those in the case at bar are likewise. If that case be sound, then the opinion of the Court of Appeals in this case is unsound.

The importance of *Van Dyke v. Bluefield Gas Company*, 25 CCH Labor Cases Par. 68,161, arises out of this situation. In a long, unbroken line of cases involving the sleeping time of firemen working under a two-platoon system like that here involved and related cases, the courts have held that such sleeping time was not compensable working time. See: *Bowers v. Remington Rand, Inc.*, (7 Cir., 1946), 159 F.(2d) 114 Cert. denied 331 U.S. 864, 67 S. Ct. 1083, 91 L. Ed. 1288, reh. denied 330 U.S. 864, 67 S. Ct. 1198, 91 L. Ed. 1869; *Bell v. Porter*, (7 Cir. 1946), 159 F.(2d) 117, Cert. denied 330 U.S. 813, 67 S. Ct. 1092, 91 L. Ed. 1267, Reh. denied 330 U.S. 813, 67 S. Ct. 1198, 91 L. Ed. 1869; *Bridgeman v. Ford, Bacon & Davis, Inc.* (8 Cir. 1947), 161 F.(2d) 962; *Johnson v. Dierks Lumber & Coal*

Co., (8 Cir. 1942), 130 F.(2d) 115; *Wantock v. Armour & Co.*, (7 Cir. 1944), 140 F.(2d) 356, Affd. 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 649; *McGregor v. Trojan Powder Co.*, (D.C. Ohio, 1946) 11 CCH Labor Cases 70118; *Muldowney v. Seaburg Elevator Co.*, (D.C. N.Y. 1941) 39 F. Supp. 275; *Plummer v. Harvester War Depot, Inc.*, (D.C. N.Y., 1946) 70 F. Supp. 495; *Buckner v. Armour & Co.*, (D.C. Tex., 1942) 53 F. Supp. 1022; *Skidmore v. Swift & Co.*, (1944), 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124; *Eustace v. Fed. Cartridge Corp.*, (D.C. Minn., 1946), 66 F. Supp. 55. In each of these cases the Court considered the question of whether there were adequate facilities and reasonable opportunity for sleep and based its decision thereon. Yet, in some of these cases, because the firemen were paid an hourly wage, it was necessary to make an allocation of paid and unpaid hours, for otherwise pay could not have been calculated. In *Van Dyke v. Bluefield Gas Company, supra*, however, we have, like in the case at bar, a monthly wage and no agreement as to what should constitute hours worked, since there was no occasion for it. Under these circumstances the Court did just what the trial court did in the case at bar—looked to see whether there were adequate facilities and reasonable opportunity for sleep.

In *Skidmore v. Swift*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124, involving the compensability of sleeping time of firemen under the Act, this Court did hold that the trial court should consider the agreement between the parties. The Court of Appeals has stated there was "absence of an express or implied agreement as to sleep-

ing time" in the case at bar. R. 472. But in *Skidmore v. Swift, supra*, this Court, in speaking of the Administrator's regulations, further held on sleeping time of firemen, as follows:

> ". . . the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the work week and the inclusion of all other on call time; although the employees were required to remain on the premises during the entire time, the evidence shows that they were rarely interrupted in their normal sleeping and eating time, and these are pursuits of purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances."

Aside from any agreement as to what constitutes compensable time worked, the principal tests for determining whether sleeping time of firemen was work time have been the adequateness of facilities and the opportunity for reasonably uninterrupted sleep. The Court of Appeals recognized there was no agreement, express or implied, in the case at bar. R. 472.

The trial court in the case at bar, on substantial evidence, found these firemen had reasonable opportunity for eight hours sleep. R. 94. The Court of Appeals found to the contrary. R. 473, 474. Is the finding by the trial court that these firemen had reasonable opportunity for eight hours sleep a mixed question of fact and law for which the Court of Appeals can freely substitute its own judgment? Clearly, it is not.

CONCLUSION

The principles involved in the issue of whether the community firemen of Richland and North Richland, Washington, were closely related and directly essential to the production of goods for commerce are of such substantial importance and of such widespread application that an authoritative decision of this Court is essential.

The theory that a trial court's finding of fact as to what is compensable time worked is a mixed question of law and fact and that an appellate court may substitute its judgment therefor, without regard to Rule 52(a), Rules of Civil Procedure, is in conflict with the decisions of this Court and other Courts of Appeal. It is a question which very substantially affects the rights of an appellant under this Act—be he employer or employee.

Accordingly, petitioner prays that *certiorari* be granted herein.

Respectfully submitted,

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CERTIORARI DENIED